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Service of Process—Jurisdiction Over Foreign Corporations

Three recent decisions, one by the United States Court of Appeals for the Fourth Circuit¹ and two by the North Carolina Supreme Court,² focus attention on conflicting views concerning a foreign corporation's amenability to suit in a state where it conducts some activities but is not licensed to do business.³ The North Carolina General Assembly provided by statute for service of process on foreign corporations "not transacting business in this State," but which engage in certain specified activity.⁴ In two of the afore-mentioned decisions, the courts took a restrictive view of state jurisdiction over such corporations and held the statute unconstitutional as applied to the facts of each case;⁵ in the third decision, the statute was upheld.⁶

An examination of these cases should perhaps be prefaced by a brief consideration of the judicial history of state jurisdiction over foreign corporations. The subject has not had constancy as one of its characteristics. Originally, the view was taken that a corporation could be sued only in the state that created it.⁷ This view was superseded by the "implied consent" theory,⁸ which in turn was replaced by the "presence" theory.⁹ Actually, these last two theories relied on the same criterion, *viz.*, whether or not the corporation was "doing business" in the state. Since a state has power to keep a foreign corporation out,¹⁰ when the corporation entered the state its "implied consent" to be sued therein was

¹ Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F. 2d 502 (4th Cir. 1956).

² Painter v. Home Finance Co., 245 N. C. 576, 96 S. E. 2d 731 (1957) and Putnam v. Triangle Publications, Inc., 245 N. C. 432, 96 S. E. 2d 445 (1957).

³ No difficulty arises in situations in which a foreign corporation actually consents to being sued by appointing an agent to receive service of process, and service is made pursuant to the statute. Re Louisville Underwriters, 134 U. S. 488 (1890); Ex parte Schollenberger, 96 U. S. 369 (1878). There may be a problem in such a situation, however, concerning the scope of the agent's authority, *i.e.* whether it extends to causes of action arising in other jurisdictions, or is based solely on corporate acts within the territory of the forum. See In Morris & Co. v. Scandinavia Ins. Co., 279 U. S. 405 (1929) and Louisville and N. R. Co. v. Chatters, 279 U. S. 320 (1929).

⁴ N. C. GEN. STAT. §§ 55-38.1 and 55-38.2 (Supp. 1955). The activities specified are set out on p. —, *infra*.

⁵ Putnam v. Triangle Publications, Inc., 245 N. C. 432, 96 S. E. 2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F. 2d 502 (4th Cir. 1956).

⁶ Painter v. Home Finance Co., 245 N. C. 576, 96 S. E. 2d 731 (1957).

⁷ Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 519, 588 (1839), where Chief Justice Taney stated: "It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

⁸ St. Clair v. Cox, 106 U. S. 350 (1882); Insurance Co. v. French, 59 U. S. (18 How.) 404 (1855).

⁹ Barrow Steamship Co. v. Kane, 170 U. S. 100 (1897).

¹⁰ Paul v. Virginia, 75 U. S. (8 Wall.) 168 (1868); 23 AM. JUR., *Foreign Corporations* § 235 (1939).

constructed by the courts.¹¹ But a foreign corporation had entered a state (so as to give its "implied consent" to suit) only when it was "doing business" therein.¹² And a foreign corporation was not "present" in the state unless it was "doing business" therein,¹³ thus the common criterion.¹⁴

It was early established that state jurisdiction over a foreign corporation was primarily a question of due process of law, and that a personal judgment against a defendant, whether individual or corporate, over whom the court has no jurisdiction, violates the Fourteenth Amendment of the United States Constitution and is void.¹⁵

The test of state jurisdiction over foreign corporations was analyzed and overhauled by the United States Supreme Court in *International Shoe Co. v. State of Washington*,¹⁶ which today remains the landmark case in this field of the law. It has been almost universally cited as having liberalized, *i.e.*, extended, state jurisdiction over foreign corporations. This is true notwithstanding the Washington Supreme Court's having held the corporation subject to suit in the state under the already well-established rule that "solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there."¹⁷ In affirming judgment, the United States Supreme Court nowhere refuted this basis for the state court's decision. However, the opinion manifests an obvious intent to overhaul the test for state jurisdiction over foreign corporations, so the fact that it was done by *dicta* is probably of no consequence.

"PRESENCE" TEST: DISCARDED OR DISGUISED?

Characterizing the "implied consent" rule as a mere legal fiction¹⁸ and the "presence" test as begging the question,¹⁹ the Court pronounced

¹¹ *St. Clair v. Cox*, 106 U. S. 350 (1882). ¹² *Ibid.*

¹³ *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914); *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530 (1907).

¹⁴ It should be noted that there are three degrees of "doing business" for three different legal purposes: (1) the least degree is that which will permit service of process in a suit against a foreign corporation; (2) a higher degree is necessary to subject such a corporation to a tax on its activity; (3) a still higher degree is the standard for the application of statutes requiring qualification in the state. See Isaacs, *An Analysis of Doing Business*, 25 Col. L. Rev. 1018 (1925); *Travelers Health Assn. v. Virginia*, 339 U. S. 643 (1950).

Consideration is herein related only to the first of these legal purposes, *viz.*, the state's power to serve its process on a foreign corporation so as to validly subject it to a judgment *in personam*.

¹⁵ *Riverside and Dan River Cotton Mills v. Menefee*, 237 U. S. 189 (1915); *Pennoyer v. Neff*, 95 U. S. 714 (1877).

¹⁶ 326 U. S. 310 (1945).

¹⁷ *Id.* at 318.

¹⁸ *Id.* at 314.

¹⁹ *Id.* at 317. "To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits

a statement which may be said to epitomize the *International Shoe* doctrine: "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ²⁰ The Court's usage of the phrase, "if he be not present," and its characterization of the "presence" test as begging the question to be decided apparently furnished the motivation for courts and commentators to conclude that the *International Shoe* decision discarded the "presence" test (and its criterion, "doing business"). ²¹ This conclusion, even if technically correct, may tend to state too much. It implies that no longer must a corporation have agents present in the state, doing business, as a requisite to its being subject to suit therein. ²² It implies that no longer will courts think in terms of "presence," and that (since "'presence' of a corporation can be manifested only by activities of those authorized to act for it") ²³ a foreign corporation may be subjected to suit in a state wherein not one of its agents ever set foot. That such an inference may be drawn seems attested to by statutes such as the one herein considered, ²⁴ designed to confer on the state jurisdiction over foreign corporations not doing business in the state, and making a basis for jurisdiction such acts as the corporation's making "any contract . . . in this State," or its repeated solicitation of business in the state by mail. ²⁵ The validity of such a statute rests on the dubious assumption that the "minimum contacts" doctrine of *International Shoe* altogether excludes the necessity of the corporation having agents physically present in the state asserting jurisdiction.

against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."

²⁰ *Id.* at 316. The case is said to have laid down the test of "minimum contacts," also referred to in the opinion as "contacts, ties, or relations." *Id.* at 319.

²¹ This is a stock observation of courts and commentators interpreting the decision. *E.g.*, see Putnam v. Triangle Publications, Inc., 245 N. C. 432, 96 S. E. 2d 445 (1957); and Notes, 16 U. CHI. L. REV. 523 (1949) and 30 N. C. L. REV. 454 (1952). This is not to say that the observation is not technically correct, since, in name, the "presence" test was quite obviously replaced by the "minimum contacts" test.

²² The fact that a foreign corporation attempts to withdraw from the state after having made transactions giving rise to the liability sued on does not affect the power of the forum to subject the corporation to suit. *Washington ex rel. Bond & Goodwin & Tucker v. Superior Court*, 289 U. S. 361 (1933); *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147 (1903); *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602 (1899).

²³ *International Shoe Co. v. State of Washington*, 326 U. S. at 316.

²⁴ N. C. GEN. STAT. § 55-38.1 (Supp. 1955).

²⁵ *Id.*, subsection (a), subdivisions (1) and (2). For statutes of other states similar to the one herein considered, see *Compania De Astral, S. A. v. Boston Metals Co.*, 205 Md. 237, 107 A. 2d 357 (1954), cert. den., 348 U. S. 943; *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664 (1951).

It may seem obstinate to argue that the Court did not intend to dispense with presence of the corporation's agents as a requisite to jurisdiction when it flatly stated: "if he be not present within the territory of the forum, he [must] have certain minimum contacts with it. . . ."²⁶ But following this statement, the Court cited *Milliken v. Meyer*,²⁷ from which was quoted the phrase, "traditional notions of fair play and substantial justice."²⁸ There, the defendant, an individual domiciled in Wyoming, was personally served with Wyoming process while in Colorado, pursuant to a Wyoming statute authorizing such service. It was held that the defendant's domicile in Wyoming was a sufficient basis for the extra-territorial service.

Few would contest a state's jurisdiction over a domestic corporation, though all its officers, directors, employees, agents, and security holders be out of the state. Therefore, the statement in *International Shoe*, "if he be not present," as applied to a corporation, merely refers to a foreign corporation, and not necessarily a foreign corporation whose agents have never been physically present in the state asserting jurisdiction over it. In *Milliken v. Meyer*, the defendant's domicile in Wyoming provided the basis for that state's extra-territorial jurisdiction over him. Since there can be no such basis where a foreign corporation is concerned,²⁹ it seems doubtful that the Court in *International Shoe* intended by the statement, "if he be not present," to discard the "presence" theory to the extent that a state could acquire jurisdiction over a foreign corporation whose agents have never been physically present in the state. This doubt is strengthened by the Court's statement that the "presence" of a corporation can be manifested only by activities of those authorized to act for it, and that the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agents "within the state" (Emphasis added) which courts will deem sufficient to satisfy the demands of due process.³⁰ Any inference that the Court had ceased to think in terms of "presence" would seem to be negated by two sentences in the final paragraph of the opinion: "For Washington has made one of

²⁶ 326 U. S. at 316.

²⁷ 311 U. S. 457 (1940).

²⁸ The Court in *Milliken v. Meyer*, *supra* note 27, had borrowed the terms "fair play" and "substantial justice" from Holmes, J., in *McDonald v. Mabee*, 243 U. S. 90, 91 (1917).

²⁹ Except perhaps when a foreign corporation domesticates, but it is extremely unlikely that the Court had such a situation in mind.

³⁰ *International Shoe Co. v. State of Washington*, 326 U. S. at 316, 317. Furthermore, it was stated that where a corporate agent is only casually present within the state or he conducts only single or isolated items of activity, it would lay too great and unreasonable a burden on the corporation to comport with due process to require the corporation to defend the suit away from its home or other jurisdiction where it carries on more substantial activities.

It would seem *non sequitur* that since casual presence will not suffice, no presence will.

those activities [*viz.*, employing salesmen within the state], which taken together establish appellant's [the corporation's] 'presence' there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. . . . The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax."³¹

On first impression, *Travelers Health Assn. v. Virginia*³² appears to justify the inference that "presence" is no longer a consideration. There, the defendant mail-order health insurance association, located in Nebraska, had for years been issuing insurance certificates to Virginia residents upon recommendations of Virginia "members." It was held that Virginia, under its "Blue Sky Law," had power to issue a cease and desist order to enforce at least the requirement that the defendant consent to suit against it by service of process on the secretary of state. The Court's opinion, by Black, J., stated: "But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."³³ Although the defendant had "caused claims to be investigated,"³⁴ it solicited its insurance solely by mail. Thus, it might appear that "presence" is not essential for jurisdiction. *However, five justices expressed opinions to the contrary.* Four of them dissented because in their opinion: "No agent of the appellant corporation has entered the State. . . . The contracts were made wholly in Nebraska. Under these circumstances, I would hold that appellants were never 'present' in Virginia."³⁵ Douglas, J., concurring with the four-man opinion of the Court by Black, J., expressed the opinion that the Virginia members of the defendant association were for all practical purposes "agents" of defendant; thus, he found "presence."³⁶ Justice

³¹ *Id.* at 321.

³² 339 U. S. 643 (1950).

³³ *Id.* at 647.

³⁴ *Id.* at 646.

³⁵ *Id.* at 658. Minton, J., writing the dissent, also stated. "As I understand the International Shoe Co. case, the minimum contacts which a corporation has in the state must be 'activities of the corporation's agent within the State.'" *Id.* at 658, 659.

³⁶ *Id.* at 654, 655: "Where the corporate project entails the use of one or more people in the state for the solicitation of business, in my view it does no violence to the traditional concept of due process to allow the state to provide protective measures governing that solicitation."

The seemingly unique treatment reserved for the defendant foreign insurance corporation is further illustrated by a North Carolina case factually in point with the *Travelers Health* case, where the defendant was held to be "doing business" within the meaning of that term as used in a statute conferring jurisdiction over foreign insurance companies, the court stating: "The dominant purpose of such a statute is to protect residents of the State from being imposed upon by foreign insurance companies. In case any such company offers to do business with one within such protection, it holds itself out as having qualified to do such business, and the resident, in the absence of knowledge, actual or constructive, to the

Douglas also pointed to the wide power of a state by virtue of the McCarran Act³⁷ to exclude an interstate insurance company which refuses to comply with its regulatory laws.³⁸ Thus, it might be more accurate to cite this case as supporting, rather than opposing, the theory that a foreign corporation's agents must have been present in the state for jurisdiction to obtain.

It is not doubted that in *International Shoe* the "minimum contacts" test was meant to supersede the "presence" test. However, the change seems to have been one chiefly of terminology.³⁹ On the other hand, regardless of the Court's intention, the result has been to liberalize the law, *i.e.*, to give the states wider jurisdiction over foreign corporations by requiring less activities of them in the territory of the forum to subject them to suit there.⁴⁰ Indeed, the very adoption of the term "minimum contacts" as the test, with the resultant deemphasis of the terms "presence" and "doing business," is a semantic indication that less will now suffice.

CONVENIENCE AS A FACTOR

Three factors were deemed weighty in determining whether the foreign corporation had established "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" They were: (1) whether the activities within the state have been continuous and systematic or only single or isolated;⁴¹ (2) whether or not the activities give rise to the liabilities sued on;⁴² and (3) an estimate of the inconveniences which would result to the corporation from a trial away from its "home" or principal place of business.⁴³ The first two were merely a recognition of factors deemed pertinent in

contrary, may safely act upon the faith thereof." *Lunceford v. Commercial Travelers Mutual Accident Assn.*, 190 N. C. 314, 129 S. E. 805 (1925), followed in *Suits v. Old Equity Life Ins. Co.*, 241 N. C. 483, 85 S. E. 2d 602 (1955), which cited the *Travelers Health Assn. v. Virginia* and *International Shoe* cases.

³⁷ 59 STAT. 33, ch. 20, 15 U. S. C. §§ 1011-1015 (1945).

³⁸ *Travelers Health Assn. v. Virginia*, 339 U. S. at 652.

³⁹ See Judge Sobeloff's statement to this effect in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956). Justice Rutledge, writing the opinion in *Nippert v. City of Richmond*, 327 U. S. 416, 422 (1946), said that *International Shoe* decided that regular and continuous solicitation constitutes "'doing business,' contrary to formerly prevailing notions."

⁴⁰ See, for example, *Compania De Astral, S. A. v. Boston Metals Co.*, 205 Md. 237, 107 A. 2d 357 (1954), cert. den., 348 U. S. 943; *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654 (D. C. Md. 1950); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664 (1951).

⁴¹ 326 U. S. at 317.

⁴² *Ibid.*

⁴³ *Ibid.*, quoting L. Hand, J., in *Hutchinson v. Chase & Gilbert*, 45 F. 2d 139, 141 (2d Cir. 1930). No mention was made of the plaintiff's convenience, although Black, J., alluded to such in his dissent, stating that in his opinion the Constitution gave the states power "to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. . . ." *Id.* at 323.

earlier decisions,⁴⁴ and so well-founded as to need no elaboration here. The third one, however, constituted a new element of consideration,⁴⁵ the propriety of which seems arguable. Perhaps it should be noted that the accuracy in assigning considerations of convenience as underlying the *International Shoe* case has been questioned,⁴⁶ but it appears to have been only a voice in the wilderness.⁴⁷ In fact, the opinion in *Travelers Health Assn. v. Virginia* affirms the existence of this consideration and goes further to bring in a consideration of the local citizens' inconvenience in having to sue the foreign corporation in its home state, likening the matter to the doctrine of *forum non conveniens*.⁴⁸ In the opinion of Judge Learned Hand, *International Shoe* holds that in order to determine jurisdiction "the court must balance the conflicting interests involved; *i.e.*, whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of 'forum non conveniens.'"⁴⁹

That considerations of mere convenience of the parties are proper in this jurisdictional issue, and a comparison of these considerations to *forum non conveniens* seem highly questionable. One obvious fallacy appears in the comparison: *Forum non conveniens* presupposes the defendant's amenability to suit in the forum exercising the doctrine, but if the forum is not the convenient one it may decline to exercise its jurisdiction;⁵⁰ whereas, in the *International Shoe* type case the very issue is whether the forum has jurisdiction, and the convenience element is in-

⁴⁴ *Ibid.*, citing the earlier decisions in which these factors were deemed relevant.

However, the Court further stated that the test to determine whether there has been sufficient activity in the state to subject the foreign corporation to suit there "cannot be simply mechanical or quantitative," but "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319. This "quality and nature" criterion was expressly drawn from the non-resident motorist situation (*Id.* at 318, citing *Kane v. New Jersey*, 242 U. S. 160, *Hess v. Pawloski*, 274 U. S. 352, and *Young v. Masci*, 289 U. S. 253), thus making it of dubious value in the ordinary foreign corporation situation where the suit does not usually arise from an auto accident, or even a tort.

⁴⁵ New, that is, in United States Supreme Court decisions. L. Hand, J., had injected this element into the picture in *Hutchinson v. Chase & Gilbert*, 45 F. 2d 139 (2d Cir. 1930), which the Supreme Court relied on considerably in *International Shoe*, at 316-317.

⁴⁶ Note, 61 HARV. L. REV. 1254, 1255 (1948).

⁴⁷ No other commentary or decision taking this position has been discovered.

⁴⁸ 339 U. S. at 648, 649.

⁴⁹ *Kilpatrick v. Texas & P. Ry. Co.*, 166 F. 2d 788 (2d Cir. 1948), cert. den. 335 U. S. 814, criticized in Note, 61 HARV. L. REV. 1254 (1948).

⁵⁰ "Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 504 (1947). "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Id.* at 506, 507.

tended to go to the root of the issue of jurisdiction *vel non*. Moreover, it seems doubtful that the underlying principles of the two theories are in harmony. Briefly stated, *forum non conveniens* is designed to secure trial in the most appropriate forum from the standpoint of justice for all parties,⁵¹ whereas the *International Shoe* doctrine is concerned only with inconvenience to the defendant foreign corporation.⁵² Of course, the *Travelers Health Assn. v. Virginia* opinion, by Black, J. (who vigorously dissented in *International Shoe* for fear state jurisdiction was being curtailed)⁵³ injected into the *International Shoe* doctrine the additional factor of the plaintiff's convenience.⁵⁴ It may be wondered that the two considerations do not cancel each other, since what will be convenient for one will be inconvenient for the other, and *vice versa*. The foreign corporation presents a novelty, its presence in the forum depending as it does upon the activities of those who act for it. But to condition a state's jurisdiction on the convenience of the defendant (or of either, or both, parties) is indeed novel. What is to be the result when convenience is actually no factor, *e.g.* a New Jersey corporation doing business in Jersey City, New Jersey, and having only minimal contacts with the state of New York, being sued in a court in New York City by a resident thereof. Will the fact that suit in New York City will work no great inconvenience to the corporation suffice to give the New York court jurisdiction over a foreign corporation not present, doing

⁵¹ "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. *But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.* (Emphasis added.)

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947).

In the typical *International Shoe* type case, it is likely that few of these considerations would weigh in the foreign corporation's favor.

⁵² 326 U. S. at 317. See note 43, *supra*.

⁵³ *Id.* at 323, where Black, J., stated: "It [the Court] has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution."

⁵⁴ 339 U. S. at 648, 649.

business, in New York? In short, will convenience supply part of the requisite "minimum contacts?" If so, then, conversely, considerable inconvenience to the corporation would result in lack of jurisdiction where only the barest "minimum [business] contacts" exist.

If the convenience element is designed to secure justice (due process), it is also designed to defy statutory definition or reasonable predictability by the parties. Each case must hinge, to some extent at least, on the distance between the foreign corporation's home or principal place of business and the court where suit is brought. No reason appears for showing more concern for the foreign corporation's convenience than is shown for the individual defendant's convenience.⁵⁵ As respects due process, either type of defendant is afforded the most a party should have a right to expect in the way of demanding another forum, by virtue of the doctrine of *forum non conveniens*, to be exercised in the interests of a fair trial—not for one party's mere convenience, which must necessarily be at the inconvenience of his adversary.

INTERNATIONAL SHOE INTERPRETED

Apparently interpreting the *International Shoe* decision liberally, the 1955 North Carolina General Assembly enacted General Statute § 55-38.1, pertinent parts of which read: "(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State . . . on any cause of action arising as follows: . . . (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or (4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance."

In *Putnam v. Triangle Publications, Inc.*,⁵⁶ subdivision (3) of the above statute was declared unconstitutional as applied to the facts of that case.⁵⁷ Defendant foreign corporation published magazines in Philadelphia and sold them to eighteen independent wholesale newsdealers in North Carolina, title passing upon delivery by defendant to the common carrier in Philadelphia. The magazines were paid for at defendant's Philadelphia or Washington offices, no offices of any kind being

⁵⁵ Apparently, none is shown. See *Hess v. Pawloski*, 274 U. S. 352 (1927); *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623 (1935).

⁵⁶ 245 N. C. 432, 96 S. E. 2d 445 (1957).

⁵⁷ *Id.* at 443, 96 S. E. 2d at 454.

maintained in North Carolina. Some subscriptions were solicited by mail, but the cause of action did not arise out of such solicitations. Three sales promotion representatives entered North Carolina, from two to five times a year each, for purposes of promoting sales to newsdealers and television dealers. Plaintiff's alleged cause of action was for libel and invasion of privacy as a result of an article appearing in one of defendant's magazines.

It was held that the defendant had no "contacts, ties, or relations with North Carolina, so as to make it amenable to service of process from the Courts of the State for the purpose of a judgment *in personam* against it. The occasional visits of agents of the defendant . . . are not deemed sufficient to render the defendant liable to suit in the State Courts. Upon all the facts found by the judge, he correctly concluded that defendant has not transacted or done business in the State. . . ."⁵⁸ The case of *Smyth v. Twin State Improvement Corp.*,⁵⁹ was distinguished on grounds indistinguishable from the "presence" theory; thus: "In that case the defendant was in the State of Vermont and committed the tort in the state."⁶⁰ Although *International Shoe Co. v. State of Washington* was quoted extensively⁶¹ and *Travelers Health Ass'n. v. Virginia* was cited,⁶² no attempt was made to base the decision on inconvenience to the corporation; indeed, the convenience factor was not even adverted to.

The Court cited with approval the recent case of *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*,⁶³ where it was held that subdivision (3) of the same statute⁶⁴ may not validly subject a foreign corporation not doing business in North Carolina to the jurisdiction of the state for a breach of warranty action arising from a single sale consummated in New York "with the reasonable expectation that those goods are to be used or consumed in [North Carolina] and are so used or consumed."⁶⁵ Sobeloff, J., writing the *Erlanger Mills* opinion, perceived that, "Though the 'minimum contact' theory may have liberalizing tendencies, it was not so much an innovation on due process as it was a rephrasing of the

⁵⁸ *Id.* at 441, 96 S. E. 2d at 453, citing the *International Shoe* case. The Court interpreted the word "goods" as used in the statute to include "magazines," and was also of the opinion that the alleged tort was not committed in North Carolina, hence subdivision (4) of G. S. 55-38.1(a), making "tortious conduct" in the state a basis for jurisdiction in a suit arising therefrom, was held not applicable. But the Court stated that if subdivision (4) were applicable, it "would raise a serious question as to its constitutionality." *Id.* at 444, 96 S. E. 2d at 455.

⁵⁹ 116 Vt. 569, 80 A. 2d 664 (1951), where defendant foreign corporation was held subject to suit in Vermont for alleged negligent re-roofing of plaintiff's house there.

⁶⁰ 245 N. C. at 443, 444, 96 S. E. 2d at 454.

⁶¹ *Id.* at 438, 439.

⁶² 239 F. 2d 502 (4th Cir. 1956).

⁶³ N. C. GEN. STAT. § 55-38.1(a) (3) (Supp. 1955).

⁶⁴ 239 F. 2d at 505, quoting a portion of the statute, *supra* note 64.

prevailing fictional tests, in order more properly to describe the judicial methodology long employed."⁶⁶

In dismissing the contention that a visit of one of the corporation's agents to North Carolina to attempt to compromise the controversy was a sufficient basis for jurisdiction, Judge Sobeloff clearly indicated that courts still think in terms of "presence": "This incidental and ephemeral presence of the [corporation's] agent is not the equivalent of the presence of the [corporation], and it is to be remembered that it is the [corporation's] 'presence'—a term that symbolizes adequate contacts—that is needed to make it amenable to suit in North Carolina. So also 'contacts' is not to be understood in the most literal sense, as though the law's requirement is satisfied by a foot-fall on the State's soil. The word refers to the relationship through activity deemed substantial."⁶⁷ If, as Judge Sobeloff states, "presence" is a term that symbolizes "adequate contacts," which is presumably synonymous with "minimum contacts," then *International Shoe* truly represents only a change of nomenclature.

Apart from the value of Judge Sobeloff's statements as interpretive of the *International Shoe* doctrine, they are significant as a reflection of the judicial inclination, or perhaps desire, to think in terms of "presence" when applying the "minimum contacts" test.⁶⁸ It also seems significant that the corporation's inconvenience in having to defend a suit in North Carolina was not mentioned as a reason for denying jurisdiction.⁶⁹ Apparently, it would have made little difference if the contract sued upon had been consummated in North Carolina rather than in New York, because "the place of execution and performance of the contract are not alone decisive."⁷⁰ Further, there was a strong intimation that no jurisdiction would have existed even had the plaintiff's cause of action been in tort.⁷¹

⁶⁶ *Id.* at 506.

⁶⁷ *Id.* at 509.

⁶⁸ Cf. *In Compania De Astral, S. A. v. Boston Metals Co.*, 205 Md. 237, 107 A. 2d 357 (1954), cert. den. 348 U. S. 943, where a foreign corporation not regularly doing business in Maryland was held subject to suit there under a statute conferring jurisdiction over such corporations on a cause of action arising on a contract made in the State, whether or not the corporation was doing business there. However, the contract was for the purchase of ships lying in Maryland waters; defendant's president came into Maryland to negotiate the contract and inspect the ships; defendant, by the terms of the contract, had deposited money in escrow in Baltimore, and was required to comply with certain requirements of the state maritime commission.

⁶⁹ Judge Sobeloff stated that, "The question to begin with is whether there is legal power in the State's courts over the corporation." 239 F. 2d at 509.

⁷⁰ *Id.* at 505. This throws doubt on the validity of subdivision (1) of G. S. 55-38.1(a), which confers jurisdiction for causes of action arising "Out of any contract made in this State or to be performed in this State."

⁷¹ "We are not persuaded by the argument that jurisdiction should be sustained because it is said there would be jurisdiction if the suit were for a tort arising

Where the corporation's *activity in the state* is tortious, however, the courts are more inclined to take a liberal view of the state's jurisdiction. In *Painter v. Home Finance Co.*,⁷² the defendant foreign corporation was held subject to local jurisdiction where its agent apparently entered the state for the sole purpose of repossessing plaintiff's automobile, resulting in plaintiff's suit for wrongful taking of property, invasion of privacy, unlawful public threats of duress, and mental and physical suffering resulting therefrom. Jurisdiction was upheld under subdivision (4) of G. S. 55-38.1(a), which provides for service of process on foreign corporations "not transacting business in this State" for any cause of action arising out of "tortious conduct in this State."⁷³

The trial court's finding that defendant's activity (including perhaps the fact that its president resided in North Carolina) constituted "doing business" in the state was expressly held unnecessary and treated as surplusage since the statute does not require such. The brief opinion made no reference to *Putnam v. Triangle Publications, Inc.*,⁷⁴ decided earlier the same month, where the Court had held subdivision (3) of the same statute unconstitutional and expressed doubt as to the constitutionality of subdivision (4).⁷⁵

Painter v. Home Finance Co., now stands alongside *Smyth v. Twin State Improvement Corp.*,⁷⁶ a Vermont decision, in holding that the commission of a tort by a foreign corporation's agents physically present in the state subjects the corporation to suit therein based on the tort. Although the corporate activity in these cases was not "continuous and systematic,"⁷⁷ its giving rise to the liabilities sued on,⁷⁸ taken with a due regard for its nature and quality⁷⁹ (tortious), probably justifies jurisdiction under the *International Shoe* doctrine.

from the transaction between the parties rather than for a breach of contract. Appellant's [plaintiff's] premise, that there would be jurisdiction if the case were one in tort is without authoritative support." *Id.* at 507.

⁷² 245 N. C. 576, 96 S. E. 2d 731 (1957).

⁷³ See p. 554, *supra*, where pertinent parts of the statute are set out.

⁷⁴ See note 56, *supra*.

⁷⁵ See note 58, *supra*.

⁷⁶ See note 59, *supra*. Also see *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654 (D. C. Md. 1950), where defendant, having made a substantial number of sales in the state and having an agent for solicitation therein, was held subject to Maryland jurisdiction in a tort action, although its activity there was held not to be "doing business." In *Hall v. Flintkote Co.*, 139 F. Supp. 32 (D. C. Md. 1956), defendant was held to be "doing business" where it employed in the state two sales representatives to whom it furnished letterheads, these agents making inspections to see that defendant's products were being properly installed on jobs, and having desk space with a local distributor; defendant also had a telephone listing showing its distributor's address, and it guaranteed roofing projects in which its products were used.

⁷⁷ *International Shoe Co. v. State of Washington*, 326 U. S. at 317.

⁷⁸ *Ibid.*

⁷⁹ *Id.* at 319. See note 44, *supra*.

CONCLUSION

These recent decisions contrast two schools of interpretation of the *International Shoe* doctrine: On the one hand are the state legislatures, seeking maximum jurisdiction in the interests of local residents by defining "minimum contacts" in such terms as "any contract made in this State,"⁸⁰ or the repeated solicitation of business in this State by mail or otherwise,⁸¹ or the distribution of goods with the "reasonable expectation" that they will be used in this state and are so used,⁸² or "tortious conduct" in this state,⁸³ provided the suit against the foreign corporation arises out of such "contacts."⁸⁴ On the other hand are the courts, refusing to accept these definitions when it is thought they will "offend traditional notions of fair play and substantial justice,"⁸⁵ yet accepting them when they are thought not to so offend.

It has been observed that by granting to the judiciary the power to determine what is "fair play" or "substantial justice" sets up the courts as policy-making bodies.⁸⁶ There is no argument here. The question is, what is the policy? And what is it to be tomorrow? From what has gone before, these observations seem justified: (1) Since *International Shoe*, the trend is clearly toward broader state jurisdiction; (2) however, there is a marked tendency to require physical presence of the agents of the corporation in the state before subjecting it to suit therein; and (3) the forum's inconvenience to the parties is sometimes deemed a factor but is of dubious pertinence; (4) although in the desire to secure a fair trial the doctrine of *forum non conveniens* may be seemingly incorrectly applied. It may be expected that, in the future, the "presence" and "convenience" factors will decline in importance, resulting in even broader state jurisdiction, with the *forum non conveniens* doctrine available as a safeguard against injustice to the foreign corporation.

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Taxation—Marital Deduction—Life Insurance Proceeds and the Terminable Interest Rule

In the Internal Revenue Act of 1948¹ Congress repealed the 1942 community property amendments,² and added the now familiar marital

⁸⁰ N. C. GEN. STAT. § 55-38.1(a) (1) (Supp. 1955).

⁸¹ *Id.*, subdivision (2).

⁸² *Id.*, subdivision (3).

⁸³ *Id.*, subdivision (4).

⁸⁴ *Id.*, subsection (a).

⁸⁵ *International Shoe Co. v. State of Washington*, 326 U. S. at 316.

⁸⁶ Note, 20 TUL. L. REV. 437, 439 (1946). Justice Black, dissenting in the *International Shoe* case, 326 U. S. at 323, stated: "I think it a judicial deprivation to condition its exercise [state jurisdiction] upon this Court's notion of 'fair play,' however appealing that term may be."

¹ INT. REV. ACT OF 1948, 62 STAT. 110 (1948).

² INT. REV. CODE OF 1939, Sec. 811, as amended 62 STAT. 116 (1948).